

FEDERAL COURT OF AUSTRALIA

Hossam v Minister for Immigration and Border Protection [2016] FCA 1161

Appeal from: *Hossam v Minister for Immigration & Anor* [2016] FCCA 98

File number: NSD 364 of 2016

Judge: **PERRY J**

Date of judgment: 27 September 2016

Catchwords: **MIGRATION** – application for a Partner visa – where Tribunal issued an invitation under s 359A of the *Migration Act 1958* (Cth) - where appellant appointed authorised recipient – where Tribunal communicated with authorised recipient – where authorised recipient made unsuccessful attempts to contact appellant as to s 359A invitation – whether Tribunal erred in failing to extend time, or in failing to consider extending time, within which appellant could respond to s 359A invitation – appeal dismissed.

PRACTICE AND PROCEDURE – where grounds of appeal were not raised in the Court below – whether leave should be granted to raise new grounds of appeal.

Legislation: *Electronic Transactions Act 1999* (Cth) s 9(2)(d)
Migration Act 1958 (Cth) ss 5F, 359A, 359B, 359C, 360, 363A, 379G
Migration Regulations 1994 (Cth) regs 1.15A, 4.17(4), 4.18A(4), Schedule 2, cl 820.211(2), 801.221

Cases cited: *Coulton v Holcombe* (1986) 162 CLR 1
Hasran v Minister for Immigration and Citizenship [2010] FCAFC 40; (2010) 183 FCR 413
Kaur v Minister for Immigration and Border Protection [2014] FCA 1251
Kaur v Minister for Immigration and Border Protection [2014] FCA 915; (2014) 236 FCR 393
Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332
NAJT v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 134; 147 FCR 51
Suttor v Gundowda Proprietary Limited (1950) 81 CLR 418

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152
VAAC v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 74; (2003) 129 FCR 168
VUAX v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 158; 238 FCR 588

Date of hearing:	13 May 2016
Date of last submissions:	14 June 2016
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	64
Solicitor for the Appellant:	Mr M Jones, solicitor of Parish Patience Immigration Lawyers
Counsel for the First Respondent:	Ms R Francois
Solicitor for the First Respondent:	Clayton Utz
Counsel for the Second Respondent:	The Second Respondent filed a submitting appearance, save as to costs

ORDERS

NSD 364 of 2016

BETWEEN: **HASSAN MOHAMED HOSSAMELDIN HOSSAM**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **PERRY J**

DATE OF ORDER: **27 SEPTEMBER 2016**

THE COURT ORDERS THAT:

1. 1. Leave is granted to amend the notice of appeal to include the proposed ground numbered 3 in the Further Amended Notice of Appeal dated 30 May 2016.
2. 2. Leave is refused to amend the notice of appeal to include the proposed ground numbered 4 in paragraph 1 of the appellant's outline of submissions dated 29 April 2016.
3. 3. Leave is refused to raise the new grounds of appeal, being grounds numbered 2, 3 and 4 inclusive in the Further Amended Notice of Appeal dated 30 May 2016.
4. 4. The appeal is dismissed.
5. 5. The appellant is to pay the first respondent's costs fixed in the sum of \$7000.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

PERRY J:

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1. 1. INTRODUCTION

1 This is an appeal from a decision of the Federal Circuit Court (the **Court below**) dismissing an application for judicial review of the Migration Review Tribunal (now the Administrative Appeals Tribunal) (the **Tribunal**). The Tribunal had affirmed a decision of a delegate of the first respondent (the **Minister**) not to grant the appellant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the **Act**).

2 The issue on appeal is whether the Tribunal fell into jurisdictional error in failing to extend the time, or to consider extending the time, within which the appellant could respond to a notice under s 359A of the Act advising of potentially adverse information in circumstances where the notice had been given to the appellant's authorised recipient who had been unable to contact the appellant. Specifically, the appellant seeks to contend that the Court below erred in not finding that:

- (1) (1) the Tribunal's decision was affected by jurisdictional error (ground 1, Further Amended Notice of Appeal dated 30 May 2016);
- (2) (2) the appellant was denied natural justice or procedural fairness by the Tribunal as a result of its failure to consider the exercise of its power under s359B of the Act to extend time for the appellant to respond to or comment on a notice under s359A (ground 2, Further Amended Notice of Appeal dated 30 May 2016);
- (3) (3) the Tribunal acted unreasonably by failing to consider whether to exercise its power under s 359B of the Act to extend time for the Appellant to respond to or comment on the notice under s 359A of the Act (ground 3, Further Amended Notice of Appeal dated 30 May 2016);
- (4) (4) the Tribunal acted unreasonably in deciding not to extend time under s359B of the Act for the Appellant to respond to or comment on the notice under s359A (ground 4, Further Amended Notice of Appeal dated 30 May 2016); and
- (5) (5) the Tribunal failed to send the notice under s359A in a manner permitted by law on the ground that the sending of the notice to the authorised recipient by email contravened s 9(2)(d) of the *Electronic Transactions Act 1999* (Cth) (**ETA**) because the authorised recipient had not consented to information being given to him by way of electronic communication (proposed ground 4, paragraph 1 of the appellant's outline of submissions dated 29 April 2016).

3 No submissions specifically addressed the general “umbrella” ground 1. The substantive grounds are only those set out in grounds 2 to 5 above. However, none of those grounds were raised in the Court below. Accordingly, the appellant accepted that he required leave in order to raise any of the grounds of appeal.

4 In addition, the appellant sought leave in his written submissions to amend his notice of appeal to add ground 5 (then proposed “ground 4”) and orally at the hearing on 13 May 2016 to add ground 3. Leave was granted for the parties to file and serve further submissions in relation to proposed ground 3.

5 I refused to grant leave to amend the notice of appeal to include ground 5 at the hearing and explained that I would publish my reasons for so doing with my reasons for judgment on the substantive appeal. Those reasons are given at [60]-[63] below. However, I consider that it is in the interests of justice to grant leave to the appellant to amend the notice of appeal to include ground 3. That ground is ultimately concerned with same issue as the other grounds and the respondent does not contend that he would suffer any prejudice were leave to amend allowed. However, I refuse leave for the appellant to raise grounds of appeal 2 to 4 inclusive which seek to raise issues for the first time on the appeal for the reasons set out below. It follows, as ground 1 raises no separate issue, that the appeal must be dismissed with costs.

2. BACKGROUND

2.1 The visa application and decision of the delegate

6 The applicant is a citizen of Egypt. He applied for a Partner (Temporary) (Class UK) visa (**Partner (Temporary) visa**) and a Partner (Residence) (Class BS) (Subclass 801) (**Partner (Residence) visa**) on 6 March 2012 on the basis of his marriage to his sponsor in February 2012 . Attached to that application were several documents, including a marriage certificate, two statutory declarations from friends, and statements from the appellant and his sponsor regarding their relationship.

7 On 14 March 2013, the Department wrote to the appellant informing him that it had received information that the relationship on which his application was based was no longer continuing and providing him with an opportunity to respond within 28 calendar days.

8 On 9 April 2013, the appellant appointed a Mr Toufic Laba Sarkis as his authorised recipient on Form 956A. Mr Sarkis signed a declaration stating that he had been appointed to

be the appellant's authorised recipient and that "*as the authorised recipient all documents that would otherwise be sent to [the appellant] will be sent to me, including by electronic means as indicated in Question 20 (if applicable).*" Question 20 stated "*Does this person [being Mr Sarkis] agree to the department communicating with them by fax, email or other electronic means?*" The box marked "Yes" was ticked and a fax number and email address for Mr Sarkis were provided.

9 9 By a letter dated 12 April 2013, Mr Sarkis wrote at the appellant's instigation to submit evidence in support of his alleged domestic violence application, being a report from a social worker, a statutory declaration from a clinical psychologist, and a statutory declaration signed by Mr Sarkis.

10 10 On 26 September 2013, the Department wrote to Mr Sarkis in his capacity as the authorised recipient for the appellant. Enclosed with that letter was a letter to the appellant requesting outstanding documents relating to his claim that his relationship with his sponsor had ceased and that he had suffered family violence from her to demonstrate that he had been in a spousal relationship with his sponsor prior to the relationship ending. The letter to the appellant drew his attention to and quoted the definition of a spouse under regulation 1.15A of the *Migration Regulations 1994* (Cth) (the **Regulations**). The appellant did not respond to that request.

11 11 On 3 January 2014, a delegate of the Minister refused the visa applications. First, the delegate found that the appellant did not satisfy reg 820.211(2) of the Regulations and did not therefore satisfy the criteria for the Partner (Temporary) visa. Specifically, the delegate was not satisfied that the appellant was in a genuine and continuing relationship and therefore that he met the definition of "*spouse*" in s 5F of the Act. Secondly, as the Partner (Temporary) visa had been refused, the appellant could not satisfy the criteria at subclause 801.221 of the Regulations for a Partner (Residence) visa.

2.2 Procedural steps in the Tribunal

12 12 On 24 January 2014, the appellant applied to the Tribunal for review of the delegate's decision. In the part of the application for review under the heading "*Part G - Where do you want us to send correspondence about your application?*", the appellant ticked the box next to "*To my authorised recipient*" and provided the contact details of Mr Sarkis, including Mr Sarkis' postal address, telephone number and email address. Accompanying that

application for review was a form entitled “Appointment of Representative, Appointment of Authorised Recipient” dated 22 January 2014. That form identified Mr Sarkis as the appellant’s interpreter and authorised recipient, and provided Mr Sarkis’ postal address and mobile telephone number. That form did not provide Mr Sarkis’ email address. Also accompanying the application was a statement signed by the appellant and Mr Sarkis advising that the appellant was aware that Mr Sarkis was not a registered migration agent and that the appellant wished to appoint Mr Sarkis as his authorised recipient as well as his interpreter. That statement was printed on the letterhead of Mr Sarkis which listed Mr Sarkis’ post office box address, fax number, mobile number and email address. The Tribunal acknowledged receipt of that application by a letter addressed to Mr Sarkis (enclosing a further letter to the appellant) dated 4 February 2014.

13 13 On 3 February 2014, the appellant lodged a second application for review, which similarly identified Mr Sarkis as the appellant’s authorised recipient and again provided Mr Sarkis’ name, postal address, telephone number, fax number and email address.

14 14 On 23 December 2014, the Tribunal sent an email to Mr Sarkis attaching a letter addressed to the appellant and a separate letter to Mr Sarkis. The letter addressed to the appellant invited him pursuant to s 359A of the Act to comment on or respond by 6 January 2015 to information which the Tribunal considered would, subject to his comments or response, be the reason or a part of the reason for affirming the decision under review (the **s 359A invitation**). The invitation indicated that confidential information had been provided to the Department which indicated that the appellant’s claimed spouse relationship “*is actually contrived and was purely a business arrangement*”. In turn, the letter addressed to Mr Sarkis advised that the enclosed documents were given to him as the authorised recipient of the appellant, and stated that:

By providing you with these documents, the Tribunal is taken to have given the documents to the applicant. You should ensure that the applicant is informed of this invitation as soon as possible.

15 15 On 6 January 2015, Mr Sarkis sent an email to the Tribunal in reply to the email of 23 December 2014. That email advised that Mr Sarkis had not been able to get in touch with the appellant, having contacted two mobile telephone numbers and received no response from either. The email continued:

I understand the seriousness of the invitation to respond to information. I also understand that he will lose any entitlement to appear before the Tribunal to give

evidence and present argument. I am not sure whether the applicant is still overseas or failed to collect his letter which I sent to him...

16 16 As the Minister pointed out, Mr Sarkis did not in his email take issue with the Tribunal having corresponded with him by email; nor did he request further time within which to try to contact the appellant or indicate any timeframe within which the appellant might become contactable.

2.3 The Tribunal's decision

17 17 On 22 January 2015, the Tribunal decided to affirm the decision under review. That decision was communicated to Mr Sarkis by an email dated 23 January 2015, which attached a covering letter to Mr Sarkis, a letter to the appellant, and the Tribunal's reasons.

18 18 The Tribunal noted at [4] of its reasons that the appellant had been sent an invitation pursuant to s 359A of the Act (see [13] above). After setting out the detail of that letter, the Tribunal noted at [5]-[7] that:

The applicant did not respond to the invitation by the appropriate day...His authorised recipient (Mr Toufic Laba Sarkis) notified the Tribunal that he had attempted to contact the applicant both by telephone and correspondence – unsuccessfully. He informed he did not know “whether the applicant was still overseas or failed to collect the letter which I sent to him...”.

The Tribunal is aware from Movement Details that the applicant is onshore.

The applicant did not respond to the invitation pursuant to s.359A of the Act by the appropriate day (confirmed by a Tribunal No Reply to Invitation memorandum). Thus the Tribunal finds he has lost his right to a hearing pursuant to ss.359C and 360 of the Act. The Tribunal will now proceed to decision without taking any further steps to obtain the applicant's view on the information.

19 19 The Tribunal considered that the issue to be determined was whether the appellant was the spouse of the sponsoring partner at time of application (at [9]). On the evidence, the parties were married to each other for the purposes of the Act (at [12]). However, the Tribunal noted that there was no evidence available to the Tribunal as to the financial aspects of the relationship, little evidence available of the parties' household arrangements, and no evidence of any joint responsibility for the care of the sponsor's children (at [13]-[14]).

20 20 The Tribunal also gave little weight to statements from the appellant, his sponsor and from a friend of the appellant attesting as to the social aspects of the relationship in view of the fact that the sponsor had withdrawn her sponsorship of the appellant and claimed they never lived together; nor were there any supporting declarations from friends of the sponsor.

The Tribunal also observed that there was no photographic evidence of the parties representing themselves to other people as being married to each other (at [15]).

21 21 Further, the Tribunal had regard to the evidence of the sponsoring spouse who withdrew her sponsorship of the appellant and indicated that she had never lived with him. The Tribunal found that it had “*no evidence that the parties exhibit any personal commitment to each other such as mutual obligation companionship or emotional support or that they see the relationship as long-term*” (at [16]).

22 22 The Tribunal considered the confidential information which indicated that the relationship between the appellant and sponsor was a business arrangement to allow the appellant to make a Partner visa application. The Tribunal found that the appellant had not responded to that adverse information when invited to do so; nor had he responded to an invitation to comment on his sponsor’s withdrawal of her sponsorship of him (at [17]).

23 23 The Tribunal concluded (at [18]):

Having regard to the totality of the evidence and all the circumstances of the relationship, including financial and social aspects and the nature of the applicant’s and sponsor’s household and their commitment to each other, the Tribunal is not satisfied that the applicant and sponsor were living together and had a mutual commitment to a shared life to the exclusion of all others and that their relationship was genuine and continuing at [the] time of application.

24 24 In those circumstances, the Tribunal was not satisfied that the appellant was in a spousal relationship pursuant to reg 1.15A of the Regulations at the time of his application, and therefore the appellant did not meet cl 820.211(2)(a) and s 5F(2) of the Act (at [19]). The Tribunal also observed with respect to his claim to have suffered family violence that to meet the criterion in cl 820.221(3)(a), a positive finding was required that he was the spouse of the sponsoring partner at the time of application and would have continued to the time of decision save that the relationship has ended and family violence has occurred (at [21]). As the Tribunal had found that no such relationship existed at the time of application, it followed that the issue of domestic violence did not arise: cf *Kaur v Minister for Immigration and Border Protection* [2014] FCA 1251.

25 25 Accordingly, the Tribunal concluded that the appellant did not satisfy the criteria for the grant of the visa and affirmed the decision not to grant the appellant a Partner (Temporary) visa.

2.4 The decision of the Court below

26 Before the Court below, the primary issue was whether the Tribunal's failure to notify
the appellant directly of the invitation to attend a hearing and comment on information, and
the fact that the Tribunal proceeded to make a decision without a hearing, amounted to
jurisdictional error (see [25], reasons of the Court below). The Court below concluded that
the appellant's arguments relating to his authorised recipient's failure to notify him did not
amount to any error that affected the decision of the Tribunal, and dismissed the application.
As earlier mentioned, the grounds argued before the Court below were abandoned on the
appeal.

3. 3. RELEVANT LEGISLATIVE PROVISIONS

3.1 Statutory criteria for the grant of the visa

27 The relevant criteria for a Partner (Temporary) visa are set out in cl 820.211(2)(a) of
Schedule 2 to Regulations which at the relevant time provided that:

(2) An applicant meets the requirements of this subclause if:

(a) the applicant is the spouse or de facto partner of a person who:

(i) is an Australian citizen, an Australian permanent resident or an
eligible New Zealand citizen; and

(ii) is not prohibited by subclause (2B) from being a sponsoring
partner; ...

28 "Spouse" is defined in s 5F of the Act as follows:

(1) For the purposes of this Act, a person is the *spouse* of another person if,
under subsection (2), the 2 persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a *married relationship* if:

(a) they are married to each other under a marriage that is valid for the
purposes of this Act; and

(b) they have a mutual commitment to a shared life as husband and wife
to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of
whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d)
exist. The regulations may make different provision in relation to the
determination for different purposes whether one or more of those conditions
exist.

29 29 It is apparent from the use of the word “*and*” at the end of each of s 5F(2)(a) to (c) inclusive that all of the elements of the definition of a “*married relationship*” in s 5F(2)(a) to (d) must be met in order for a person to be a “*spouse*” of another person for the purposes of the Act.

30 30 Regulation 1.15A prescribes matters which must be taken into account in determining whether the conditions in s 5F(2)(a),(b),(c) and (d) of the Act are met:

(2) If the Minister is considering an application for:

...

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married to each other; and

(ii) the opinion of the persons’ friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities; and

(d) the nature of the persons’ commitment to each other, including:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together;

and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one.

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

3.2 The invitation to comment under s 359A and obligation to give the invitation to the appellant's authorised recipient

The invitation to comment was sent pursuant to s 359A of the Act. At the relevant time, s 359A(1) provided that :

Subject to subsections (2) and (3), the Tribunal must:

- (a) ***give to the applicant***, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
- (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and
- (c) invite the applicant to comment on or respond to it.

...

(emphasis added)

While s 359A(1) provides that the information and invitation must be given “*to the applicant*”, in this case the appellant had appointed Mr Sarkis as his authorised recipient under s 379G(1). That section provides that, where an applicant gives the Tribunal written notice of the name and address of another person (the “***authorised recipient***”) authorised by the applicant to receive documents in connection with the review, “*the Tribunal **must** give the authorised recipient, instead of the applicant, any document that it would otherwise have given to the applicant*” (emphasis added). Section 379G(2) in turn provides that:

If the Tribunal gives a document to the authorised recipient, the Tribunal ***is taken to have given the document to the applicant***. However, this does not prevent the Tribunal giving the applicant a copy of the document.

(emphasis added)

As such, the Tribunal was required to give the s 359A invitation to Mr Sarkis in order to discharge its obligation under s 359A to give the invitation “*to the applicant*”.

34 Section 359B(1) prescribes certain requirements with which (relevantly) an invitation under s 359A must comply. Relevantly for present purposes, s 359A(2) and (4) determine the time within which an applicant may respond to the invitation, namely:

- (2) If the invitation is to give information, or comments or a response, otherwise than at an interview, the information, or the comments or the response, are to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period.

...

- (4) If a person is to respond to an invitation within a prescribed period, the Tribunal may extend that period for a prescribed further period, and then the response is to be made within the extended period.

35 As the appellant submits, under reg 4.17(4) of the Regulations, the prescribed period for the purposes of s 359B(2) is 14 days after the receipt of the invitation or such lesser period as the person agrees to. Under reg 4.18A(4), the relevant prescribed period for the purposes of s 359B(4) is 14 days after the day on which the person receives notice of the extended period or such lesser period as the person agrees to. The Tribunal has no power to grant an extension of time once the prescribed period of 14 days has expired: *Hasran v Minister for Immigration and Citizenship* [2010] FCAFC 40; (2010) 183 FCR 413 (*Hasran*) at 419 [47]-[48] (the Court).

36 The Act does not preclude an applicant from responding to a s 359A invitation after the prescribed period has expired and before the review decision is made. Rather, in a case where no response or comments have been received upon the information in a s 359A invitation before expiry of the time for responding, the Tribunal has power under s 359C to decide the application on review without taking any further action to obtain the applicant's views on the information. Furthermore, s 360(3) provides that in such a case, the visa applicant "*is not entitled to appear before the Tribunal.*" Section 363A in turn provides that:

If a provision of this Part [i.e. Part 5] states that a person is not entitled to do something, or to be assisted or represented by another person, then, unless a provision expressly provides otherwise, the Tribunal does not have power to permit the person to do that thing, or to be assisted or represented by another person.

37 The effect of s 363A read with s 360(3) is that the Tribunal has no power to permit an applicant to appear at a hearing before the Tribunal if there is no response to the s 359A invitation before the expiry of the prescribed period (including any extended period): *Hasran* at 417-418 [25]-[32] (the Court).

4. 4. CONSIDERATION

4.1 Leave to raise new grounds: applicable principles

38 38 As earlier explained, all of the substantive grounds of appeal, being those in grounds 2 to 4 of the notice of appeal, raise new issues not raised in the Court below.

39 39 The general principles governing leave in such cases were articulated by Gibbs CJ, Wilson, Brennan and Dawson JJ in their joint judgment in *Coulton v Holcombe* (1986) 162 CLR 1 (*Coulton*). Specifically, in *Coulton* at 7-8 the Honours held that:

It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish. The powers of an appellate court with respect to amendment are ordinarily to be exercised within the general framework of the issues so determined and not otherwise. In a case where, had the issue been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this Court has firmly maintained the principle that the point cannot be taken afterwards: *see Suttor v Gundowda Pty. Ltd* [(1950) 81 CLR 418 at 438]; *Bloemen v. The Commonwealth* [(1975) 49 ALJR 219].

...

In our opinion, no distinction is to be drawn in the application of these principles between an intermediate court of appeal and an ultimate court of appeal.

40 40 The appellant relied upon authorities of this Court in the migration context in support of his application for leave and, particularly, in cases concerning claims to refugee status namely, *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; 238 FCR 588 (*VUAX*) and *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 134; 147 FCR 51 (*NAJT*). In *VUAX*, the Full Court, after referring to the passage set out above in *Coulton v Holcombe*, explained at 598-599 [48] that:

The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, **but which clearly has merit**, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused.

(emphasis added)

41 41 Subsequently, in *NAJT*, Madgwick J held at 85 [165] that:

It is no accident that the “practice” spoken of in *VUAX* has often occurred in migration matters. Especially is this so in relation to cases concerning claims to

refugee status. In the High Court and in this Court, judges have shown... that they are acutely aware of what may be at stake if the claims made are genuine. There is no longer a general system of legal aid for poor applicants, as many of them in such cases are, who are independently assessed as having reasonably arguable cases. Often, unrepresented applicants who appear to be decent, genuine but impecunious people are reduced to floundering in complete incomprehension of the prevailing system of judicial review or the dangerous partial comprehension of those with a little knowledge of that system. Unsurprisingly, Full Courts have been slower in such cases to assert the primacy of finality of litigation considerations than in many cases where the risk of very serious personal harm is not involved. In saying this, I do not lose sight of the fact that, to degrees which may vary from place to place and time to time, there is a proportion of refugee claims which are simply legally unwarranted, and cynical attempts to subvert this country's immigration system. Even the cynic, however, has a right to lawful treatment. In many areas of the law it is sometimes necessary, for the sake of the truly deserving, to accord concessions also to those ultimately shown to be undeserving.

42 42 The facts of *NAJT* met the description of matters referred to by his Honour in this passage where greater leniency might be called for, being a claim to refugee status in which the appellant sought to be legally represented but through impecuniosity was unable to achieve this. Madgwick J continued at 85 [166] to identify the relevant questions in such a case, namely:

- 1) Do the new legal arguments have a reasonable prospect of success?
- 2) Is there an acceptable explanation of why they were not raised below?
- 3) How much dislocation to the Court and efficient use of judicial sitting time is really involved?
- 4) What is at stake in the case for the appellant?
- 5) Will the resolution of the issues raised have any importance beyond the case at hand?
- 6) Is there any actual prejudice, not viewing the notion of prejudice narrowly, to the respondent?
- 7) If so, can it be justly and practicably cured?
- 8) If not, where, in all the circumstances, do the interests of justice lie?

43 43 Conti J agreed with the reasons of Madgwick J and, in particular, considered “*there is sufficient force in his Honour's adoption, in the context of the present circumstances, of the kind or area of approach taken by the Federal Court in VUAX ...*”: *NAJT* at [229].

44 44 The Minister took no issue with the approach adopted by in *VUAX* and by the majority of the Full Court in *NAJT*.

4.2 The parties' submissions as to the grant of leave to raise the grounds of appeal for the first time on the appeal

The appellant contended with respect to the considerations identified by Madgwick J in *NAJT* that leave should be granted for the following reasons:

- 1) The legal arguments in respect of the new grounds ...have reasonable prospects of success.
- 2) The Appellant accepts that he was legally represented in the Court below. The Appellant brought the matter to a new lawyer following the decision of the Federal Circuit Court, leading to a fresh evaluation of the evidence and the legal issues. It is submitted that all of the other considerations are strongly in the Appellant's favour and that leave should not be denied for this one reason alone.
- 3) There is no appreciable inefficiency in the use of the Court's time.
- 4) The Appellant's right to a fair hearing in the Tribunal is at stake.
- 5) The issues have importance beyond the case in hand. Grounds 2 and 3 [re-numbered grounds 2 and 4] are generally relevant to the way in which the Tribunal exercises its discretions under the exhaustive statement of the natural justice hearing rule, and ground 4 [re-numbered ground 5] deals with what procedures the Tribunal must follow in determining how to send notices under the Act.
- 6) The Respondents have been aware of the proposal to raise grounds 2 and 3 re-numbered grounds 2 and 4] since the appeal was filed. They were notified of ground 4 [re-numbered ground 5] approximately 3 weeks before the hearing date. All of the grounds deal with technical issues of interpretation of the law and do not require the hearing of any evidence or the evaluation of facts other than a small number of documents in the Appeal Book
- 7) Not applicable.
- 8) The interests of justice lie in determining whether the Tribunal has correctly carried out its obligations of fairness under the Act.

The Minister opposed the grant of leave on the grounds that, first, the appellant's explanation for his failure to raise his new grounds below (being that he found a new lawyer for the appeal) is not compelling: cf *VAAC v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 74; (2003) 129 FCR 168 at 177 [26] (The Court); *VUAX* at 598-599[46]-[48] (The Court). Secondly, the Minister contended that the new grounds lacked sufficient merit.

In contrast to the type of case which particularly concerned Madgwick J in the passage referred to in *NAJT*, this case did not involve a refugee claim; nor was this a case in which the appellant was unrepresented in the Court below. However, even assuming that this is a case where the approach adopted by the Full Court in *VUAX* and *NAJT* is applicable, in

my view leave should be refused for the reason that the grounds of appeal lack sufficient merit and (as the appellant accepts) no sufficient explanation has been given for the failure to raise the grounds below.

4.3 Do the grounds of appeal have any reasonable prospects of success?

4.3.1 Ground 1: allegation of jurisdictional error

48 48 As earlier explained, ground 1 is a general “umbrella” pleading which does not seek to raise any issues beyond those sought to be raised by the remaining grounds. As such, it cannot be sustained unless one of the other grounds of appeal has merit.

4.3.2 Grounds 2 and 3: alleged failure to consider the exercise of the power

49 49 The appellant submitted that it was not possible for him to determine if the Tribunal in fact considered whether or not to exercise the power under s 359B(4) to extend the period within which the appellant might respond or comment on the s 359A notice as the Tribunal did not expressly address that question in its reasons. As such, the appellant explained that ground 2 and ground 3, on the one hand, and 4 (originally numbered ground 3), on the other hand, were intended to address respectively the alternative possibilities that the Tribunal did not consider the power at all, or that it did consider the power but decided not to extend the period.

50 50 The appellant accepted that ground 2 was premised upon the assumption that there is an obligation upon the Tribunal in all cases to consider whether or not to exercise the power in s 359B(4) of the Act to extend time and that the failure to do so will constitute a denial of procedural fairness. In support of his submission, the appellant sought to rely upon s 357A(3) of the Act which requires the Tribunal to act in applying Div 5 “*in a way that is fair and just*”, notwithstanding that s 357A(1) provides that Div 5 “*is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.*” Sections 359A and 359B are located in Div 5 of Part 5 of the Act. The appellant also relied upon the specific circumstances of this case to “*strengthen*” the existence of the obligation here.

51 51 It is unnecessary to consider whether the Tribunal was under any such obligation. Nor does the question raised by ground 3 arise. This is because the appellant has not

established that the Tribunal failed to consider whether or not to extend time under s 359B(4). To the contrary, it may be inferred from the reasons given by the Tribunal for finding that the appellant had lost his right to a hearing pursuant to ss 359C and 360 at [4]-[7], that the Tribunal had considered whether or not to exercise the power to extend time. In particular, the Tribunal had investigated whether, as the appellant's authorised recipient suggested, the appellant may have failed to respond because he was overseas and it was only after finding out that he was onshore that the Tribunal proceeded to make a decision without taking any further steps to obtain his views on the information in the s 359A invitation. This suggests that the Tribunal may have adopted a different course if its inquiries had indicated that the appellant was abroad, including potentially allowing him an extension of time within which to respond. It follows that neither ground 2 nor ground 3 can succeed.

4.3.3 Ground 4: did the Tribunal act unreasonably deciding not to extend time?

52 52 The principles by which it is determined whether a decision is unreasonable so as to sound in jurisdictional error are not in issue. First, the legislature can be taken to have intended that the discretionary power in s 359B(4) will be exercised reasonably: see by analogy *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 (*Li*) at 362 [63] (Hayne, Kiefel and Bell JJ). Secondly, the standard of legal reasonableness “does not involve substituting a court’s view as to how a discretion should be exercised for that of a decision-maker” and courts must be conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power: *Li* at 363 [66]. Thirdly “[t]he legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused”: *Li* at 364 [67]. Finally, unreasonableness is a conclusion which may be inferred such as, for example, in the case of an obviously disproportionate response (*Li* at 366 [74]). As Hayne, Kiefel and Bell JJ held in *Li* at 367 [76]:

As to the inferences that may be drawn by an appellate court, it was said in *House v The King* [(1936) 55 CLR 499 at 505] that an appellate court may infer that in some way there has been a failure properly to exercise the discretion “if upon the facts [the result] is unreasonable or plainly unjust”. The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the

decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

53 53 In support of ground 4, the appellant contended that the Tribunal acted unreasonably in deciding not to extend time under s 359B for the appellant to respond to the s 359A invitation in circumstances where:

- (6) (1) there had been no communication from Tribunal between February 2014, on the one hand, and 23 December 2014, on the other hand, when the s 359A invitation was given;
- (7) (2) the invitation was sent by email on 23 December 2014, being the start of the festive season;
- (8) (3) the Tribunal was aware that Mr Sarkis was not the appellant's representative but only his authorised recipient and would not therefore be able to respond on the appellant's behalf;
- (9) (4) the timing of the invitation would affect any posting of the invitation by Mr Sarkis to the appellant;
- (10) (5) the response by Mr Sarkis by email was received at 10.00am on the last day of the 14 day period which the invitation had given the appellant to respond;
- (11) (6) by reason of the email, the Tribunal knew that Mr Sarkis had been unable to contact the appellant and was advised of the two mobile phone numbers by which Mr Sarkis had tried unsuccessfully to contact the appellant; and
- (12) (7) the Tribunal was advised that Mr Sarkis did not know whether the appellant was overseas or had failed to collect the letter sent to an address.

54 54 The appellant also emphasised that it was possible for there to be one extension of time of a further 14 days only and the serious consequences of failing to grant an extension of time, namely, that it would preclude the Tribunal from inviting the appellant to a hearing and the appellant would have no entitlement to appear at the hearing.

55 55 These factors do not, in my view, separately or cumulatively establish that the Tribunal's decision not to extend the time under s 359B(4) within which to respond to the s 359A invitation was unreasonable. Rather, there was, as the Minister submitted, an evident and intelligible justification for the Tribunal not extending the time within which to respond to the s 359A invitation, as the following considerations establish, notwithstanding that no reasons were given specifically addressing that issue.

(13) (1) No application had been made to the Tribunal for an extension of time under s 359B(4) of the Act; nor, while accepting that the authorised recipient did not have authority to act on the appellant's behalf, was any request made by Mr Sarkis.

(14) (2) In his email to the Tribunal, Mr Sarkis advised that he had attempted unsuccessfully to contact the appellant on two mobile phone numbers but the appellant had not responded to either. The Tribunal's inquiries revealed that the appellant was onshore thereby dispelling Mr Sarkis' suggestion that the appellant may not have responded because he was abroad. There was, therefore, no explanation for the appellant's failure to respond to Mr Sarkis' attempts to contact him.

(15) (3) No reason was apparent on the information before the Tribunal as to why the appellant might not have been able to comment within the 14 day period on the information disclosed in the s 359A invitation (i.e., that his claimed spouse relationship was a purely business arrangement and that his former spouse had withdrawn as his sponsoring spouse and had never lived with him), particularly bearing in mind that:

(a) (a) that information was consistent with the delegate's findings; and

(b) (b) the Tribunal was aware as a result of its inquiries that the appellant was not overseas.

(c) As to the first of these matters, an applicant is entitled to assume that the issues which the delegate considered dispositive are the issues arising in relation to the decision under review in the Tribunal, absent the Tribunal identifying some other issue: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 at 163 [35] (the Court). As such, the substantive issues raised in the s 359A invitation were not new as the appellant was on notice even prior to the invitation of the need to address them.

56 56 Added to this, the appellant was not prevented under the Act from otherwise making submissions and putting evidence before the Tribunal after expiry of the 14 day period but before making its decision, including on the issues raised by the s 359A invitation. Indeed, the Tribunal did not ultimately make its decision until 22 January, some 16 days after the expiry of the initial 14 day period.

57 57 With respect to the matters specifically raised by the appellant, first, by reason of the appellant having elected to appoint Mr Sarkis as his authorised recipient under s 379G, the

Tribunal's obligation was to give any document to Mr Sarkis. As a result, it was incumbent upon the appellant to ensure that Mr Sarkis was able to contact him and knew of his whereabouts for so long as his review application remained unresolved unless he withdrew his notice authorising Mr Sarkis to receive documents under s 379G(3). This is not a case where the appellant's failure to respond was out of character and a departure from his prior pattern of conduct which ought to have alerted the Tribunal that something was amiss and rendered the failure to attempt to contact him inexplicable in all of the circumstances: cf *Kaur v Minister for Immigration and Border Protection* [2014] FCA 915; (2014) 236 FCR 393, especially at 419 [95]. The fact that it might have been sensible for the Tribunal to attempt to call the appellant on the mobile numbers provided in Mr Sarkis' email (assuming that it did not in fact do so) does not make the decision not to extend time unreasonable, particularly when the Tribunal already knew that Mr Sarkis' attempts to contact the appellant by these means had been unsuccessful (see above at [15]).

58 58 Secondly, it is difficult to see how the fact that the Tribunal did not communicate with the appellant or Mr Sarkis between February 2014 when it acknowledged receipt of his application for review and 23 December 2014 when it sent the s 359A invitation could have any bearing upon the question of whether the Tribunal's decision was legally unreasonable.

59 59 Finally, while, in addition to attempting to call the appellant, the authorised recipient posted the invitation to the appellant and it is possible that the public holidays over the Christmas period may have delayed delivery of the letter, that does not render the decision to proceed without a hearing and thereby not to extend time unreasonable. The Parliament has not seen fit to limit the 14 day period to business days and, as such, must have been aware that in some cases public holidays would be counted within that period with potential impacts on the time within which any correspondence by post is delivered. Nor would there have been any reason for the Tribunal to have assumed that the only means of communication available to Mr Sarkis with the appellant was by post, as opposed to other means of communication which would be unaffected by public holidays such as a telephone call.

4.4 Reasons for refusing the grant of leave to amend to include proposed ground 5 (alleged lack of consent to electronic communications)

60 60 In his written submissions, the appellant sought to raise the further ground (originally "ground 4" and renumbered here as ground 5) that the Tribunal failed to send the notice under

s 359A of the Act in a manner permitted by law because Mr Sarkis had not consented to information being given to him in electronic form in contravention of s 9(2)(d) of the ETA.

At the hearing I ruled that the application to amend the notice of appeal to include proposed ground 5 would be refused and indicated that I would give my reasons in my written judgment on the appeal. The application was opposed on the ground that the Minister would have conducted his case differently if the issue had been raised at first instance. In particular, the Minister submitted that he may have sought to cross-examine the appellant on the reasons why he indicated in his application for review that all correspondence should be sent to Mr Sarkis and provided his email address, notwithstanding the fact that it was now contended by the appellant that there was no evidence that Mr Sarkis consented. The Minister also indicated that he may have sought to subpoena Mr Sarkis to give evidence. The appellant sought to deny that the Minister suffered any prejudice on the ground that it was for the Minister to prove that Mr Sarkis did consent on the ground that absent his consent to communications being sent to him by email, the Tribunal would not be permitted to give the information by those means under s 9 of the ETA.

However, even accepting the appellant's argument, the appellant accepted that the ETA did not prescribe any form or particular requirements for the giving of such consent. That being so, I accept the Minister's argument that the material was more than sufficient to raise a *prima facie* case that consent was given. In those circumstances, the onus lay clearly upon the appellant to demonstrate that in fact there was no consent. The appellant ran no such case below. That being so, it cannot in my view be doubted that the Minister would be prejudiced if leave were granted in that he may well have run his case differently below if the appellant had put in issue the question of whether consent had been given by Mr Sarkis to the receipt of communications in relation to the application for review by email.

For these reasons, I refused leave to amend to include proposed ground 5. As the High Court held *Suttor v Gundowda Proprietary Limited* (1950) 81 CLR 418 at 438:

The circumstances in which an appellate court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards.

5. CONCLUSION

For the reasons set out above, the appeal must be dismissed with costs. The Minister having filed an affidavit as to the quantum of costs sought to be recovered in the event that

the appeal is dismissed, I will afford the parties an opportunity to be heard as to the appropriate terms of the costs order in the Minister's favour.

I certify that the preceding sixty-four (64) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perry.

Associate:

Dated: 27 September 2016